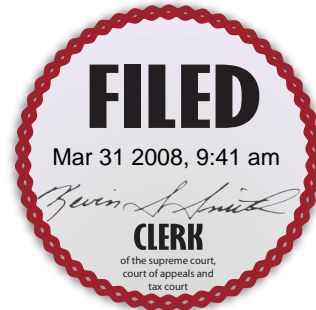


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

HARRY KEENE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 64A03-0708-CR-356

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Julia M. Jent, Judge
Cause No. 64D03-0412-CM-10994

March 31, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Harry Keene (“Keene”) was convicted in Porter Superior Court of two counts of Class A misdemeanor criminal mischief. As part of his sentence, Keene was ordered to pay restitution in the amount of \$11,290. Keene appeals and presents three issues. We consolidate and restate as follows:

- I. Whether the trial court abused its discretion in its order of restitution;
- II. Whether the trial court erred in ordering restitution as condition of Seger’s probation without inquiring into his ability to pay.

We reverse in part and remand for proceedings consistent with this opinion.

Facts and Procedural History

On November 28, 2004, Keene shot two dogs while hunting on a friend’s property. The two dogs were not on their owner’s property and were seen chasing a deer. The next day, Keene contacted the DNR and notified them that he had shot the two dogs while hunting. On December 9, 2004, he was charged with two counts of Class A misdemeanor criminal mischief.

Melissa Culbertson (“Culbertson”) owned the two dogs. On November 28, 2004, Culbertson noticed that her dogs were missing so the next day she hired a private investigation firm to look into the matter. Culbertson paid \$2,501 for this service. When the dogs’ bodies were found, Culbertson had an autopsy performed by her veterinarian that cost \$640. The replacement value of each of the dogs was \$800. Also, the Culbertson family sought professional counseling in the amount of \$540 concerning the loss of their dogs. Finally, Culbertson claimed that she had missed a week of work and took an additional seven days off work to attend court proceedings in this case. She testified that she made over \$500,000 per year, yet provided no documentation of this

amount. Culbertson claimed \$3,000 for one day of lost wages. The trial court determined that she earned \$2,500 per day. Culbertson requested \$10,890.87 for restitution for the above expenses and for other expenses disallowed by the trial court.

On February 6, 2007, Keene pleaded guilty to both counts of criminal mischief and the trial court sentenced him the same day. The trial court ordered Keene to pay restitution and ordered the Victim's Assistance office to determine the amount. That office filed a restitution order in the amount of \$10,890.87, to which Keene objected. Keene is a truck driver who earns \$25,000 per year. He has a twelfth grade education and few possibilities of earning more than his current wage as a truck driver.

After a restitution hearing on May 17, 2007, the trial court ordered Keene to pay restitution in the amount of \$1,600 for both dogs, \$640 for veterinary autopsy costs, \$2,510 for the private investigator, \$540 for counseling, and \$6,000 for two days of lost income, for a total of \$11,290. Keene now appeals.

Discussion and Decision

An order of restitution will be reversed only upon a finding of abuse of the trial court's discretion. Ault v. State, 705 N.E.2d 1078, 1081 (Ind. Ct. App. 1999). An abuse of discretion occurs where the court's decision is clearly against the logic and effect of the facts and circumstances before the court. Palmer v. State, 704 N.E.2d 124, 127 (Ind. 1999). An abuse of discretion can alone occur "when the trial court misinterprets or misapplies the law." Green v. State, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004) (citing Tapia v. State, 753 N.E.2d 581, 585 (Ind. 2001)). Finally, a restitution order is part of the criminal sentence. McKenney v. State, 848 N.E.2d 1127, 1129 (Ind. Ct. App. 2006).

Under Indiana Code section 35-50-5-3 (2004), the trial court may require the defendant, as a condition of probation or without placing the person on probation, to make restitution to the victim of the crime.¹

The court shall base its restitution order upon a consideration of:

- (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);
- (2) medical and hospital costs incurred by the victim (before the date of sentencing) as a result of the crime;
- (3) the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- (4) earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime; and
- (5) funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

Keene argues that restitution should be limited to the replacement value of the dogs. Keene and the State agree that the replacement value of the dogs is \$1,600, and we affirm the trial court's order regarding restitution for the \$1,600 for the lost dogs.

Beyond restitution for the dogs, Keen argues that the trial court had no authority to order restitution for private investigation expenses, veterinary autopsy expense, psychiatric counseling expenses, or lost wages. He believes that since the dogs were property any restitution should not exceed the value of that property. See Lachenman v. Stice, 838 N.E.2d 451 (Ind. Ct. App. 2005).

¹ The trial court relied on Haltom v. State, 832 N.E.2d 969 (Ind. 2005) to support its award of restitution. We would note that this case held that a criminal court could order restitution regardless of a civil award or settlement agreement related to the same victims and fact scenario. Haltom does not grant courts unlimited judicial discretion as far as what they consider for restitution.

Restitution is used to impress upon the defendant the severity of his or her actions and to compensate the victim for expenses directly related to the crime. Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006). The statute does not restrict the amount of restitution to the value of the damaged or lost property. Therefore we must disagree with Keene's contention that the sum total of restitution is confined to the replacement value of the property.

However, the State acknowledges that there is no case law regarding private investigation expenses or veterinary autopsy expenses. We agree. The restitution statute was not put in place to compensate a victim for such expenses. The trial court abused its discretion in awarding these expenses as part of the restitution order.

Keene argues that the psychiatric counseling expenses are not compensable under the restitution statute. Keene pleaded guilty to criminal mischief which occurs when "a person recklessly, knowingly, or intentionally damages property of another person without his consent[.]" Ind. Code § 35-43-1-2. Property is specifically defined in Indiana Code section 35-41-1-23 (2004) and includes real, personal, tangible and intangible property. However, it does not include personal injuries or medical expenses. Ash v. Chandler, 530 N.E.2d 303, 306 (Ind. Ct. App. 1988). The trial court thus abused its discretion when it awarded restitution for psychiatric counseling since criminal mischief assumes damage to property and restitution applies only to those harms that are direct and immediate results of the criminal act.

Finally, Keene argues that the trial court abused its discretion when it awarded \$6,000 for lost wages. The restitution statute provides that a victim may be awarded lost

wages that were lost before sentencing because of participation in the investigation or trial of a crime. Ind. Code § 35-50-5-3(a)(4). The trial court specifically awarded \$3,000 for the day of the restitution hearing which occurred after the date of sentencing. Tr. p. 52. We therefore conclude that the trial court abused its discretion by awarding wages lost after the date of sentencing.

The trial court also awarded Culbertson \$3,000 for lost wages when Culbertson attended hearings in this case. At the restitution hearing, Culbertson testified that her adjusted gross income was over \$500,000 during 2004 and 2005. Tr. p. 21. She claims lost income of \$3,000; however does not provide any basis for this amount. Tr. p. 24. She testified that she had been to the courthouse about seven times, including one day when the hearing was continued. Tr. pp. 22, 25. However, neither the State nor Culbertson provided evidence of the actual amount of lost wages attributable to participation in the investigation or trial of the crime before sentencing.² In fact, her testimony was that her income for one day was \$2,500 and yet she asked for \$3,000 for one day. Culbertson's mere presence in the courthouse, absent evidence of participation, is insufficient to provide a basis for restitution. Moreover, she testified that she did not attend the guilty plea hearing of Keene. We therefore conclude that the evidence is insufficient to support the trial court's award of Culbertson's lost wages.

Finally, Keene argues that the trial court should have determined his ability to pay the restitution. Although not entirely clear from the record, it appears that restitution is a

² The trial court took judicial notice of Culbertson's presence at the courthouse for a hearing that was continued. However, Indiana Rule of Evidence 201 does not allow judicial notice of such a fact.

term of Keene's probation.³ As such, the trial court was required to inquire into Keene's ability to pay any restitution. Although Keene did not raise this issue in his brief, we would note that the trial court was required, but failed, to identify the manner and time frame for the payment of restitution. Ind. Code § 35-38-2-2.3(a)(5) (2004).

Based on the facts of this case, we conclude that the trial court abused its discretion by awarding restitution for private investigation expenses, veterinary autopsy expenses, psychiatric expense, and lost wages. Although the trial court's award of \$1,600 for the replacement value of the two dogs was proper under Indiana Code section 35-38-2-2.3, the trial court failed to inquire into whether Keene was able to pay restitution of \$1,600. Therefore, we remand this case with instructions to hold a hearing to address Keene's ability to pay the proper amount of \$1,600 in restitution.

We reverse, and remand for proceedings consistent with this opinion.

FRIEDLANDER, J., and ROBB, J., concur.

³ We agree with the State that the record is not entirely clear as to whether the trial court ordered restitution as a term of probation. However, the restitution order was circulated to the probation department so we will assume that the trial court intended to order restitution as a term of probation.